C.f. 1001 (3)

IN THE HIGH COURT OF JUDICATURE CHHATTISGARH AT BILASPUR

W.P.NO. 1723 / 2004

Petitioner : Madhav Prasad S/o Late Jwala Prasad, Aged about 57 years, R/o Qr.No.1/C-32, Near Post office Bishrampur, Dist : Surguja-(C.G.)

Versus

Respondents :

1. Coal India Ltd., Through Chairman, 10, Netaji Subhash Road, Kolkatta
2. Chairman Cum Managing Director, South Eastern Coalfields Ltd., Seepat Road, Bilaspur-(C.G.)
3. Personal Manager, Kumda Sub Area, Bishrampur Area, Dist : Surguja - (C.G.)
4. Union of India Through Secretary Ministry of Coal, Shastri Bhawan, New Delhi.
5. The Director Ministry of Coal, Government of India, Shastri Bhawan, New Delhi.

P.R. No. 1106/04
Presented by Shri P.R. Patankar
23-6-04

WRIT PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA

HIGH COURT OF CHHATTISGARH : BILASPUR

WRIT PETITION NO.1723/04

MADHAV PRASAD

Vs.

COAL INDIA LIMITED & OTHERS

Shri Ravish Agrawal, Sr.Advocate with Shri P.Diwakar, Advocate for the petitioner.
Shri P.S.Koshy with Shri Abhishek Sinha, Advocates, for respondents 1, 2 & 3.

O R D E R

By this petition under Article 226/227 of the Constitution of India, the petitioner has challenged the impugned notice dated 26/06/2003 passed by respondent No. 3, whereby he has been directed that as he has completed 42 years of service, he would be superannuated on retirement with effect from 31/12/2004.

2. It is stated that the petitioner joined his services on 19/12/1962. His date of birth as per the service record Annexure-P/1 is 01/07/1947. It is contended that the petitioner was appointed as adolescent in surface of Kumda sub area as category-I labour. Presently, he is working as Senior Loading Inspector of Kumda sub area. It is further contended that he will complete the age of 60 years on 30/06/2007 and as such he is entitled to continue till 30/06/2007. It is also contended that as per Section 2(1) (a) of the Mines Act, 1952, 'adolescent' means a person who has completed his 15th year but has not completed his 18th year. The pay slip of May 2003 has been filed as Annexure P/3, wherein the date of birth of the petitioner is recorded as 01/07/1947 and there is no dispute about this. It is contended that so far as adolescent is concerned, this provision of employment was deleted with effect from 31/05/1984 and prior to it, it was a practice to employ adolescent. It is pointed out that Section 40 of the Mines Act

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has been amended and it is after the amendment the position is that now no person below 18th years of age can be allowed to work in any mine or part thereof.

3. Counsel for the petitioner contended that Annexure-P/5 dated 1/2/1999 cannot over ride the relevant provisions. The memo Annexure-P/5 merely stated that some cases have come to the knowledge that persons are rendering service more than 42 and 45 years. This matter may be looked into by the Company and considered. It does not lay down as a rule. It is for the Company to look into the matter, inquire into it and take such action. Merely on the basis of the said letter, the petitioner cannot be retired when undisputedly his date of birth is 1/7/1947. Counsel further referred to the circular Annexure-P/6 dated 13/2/1999 and also referred to notice dated 26/6/2003 issued by respondent no.3 and contended that the notice is illegal and in contravention of law.

4. Counsel for the petitioner contended that immediately on receipt of notice dated 26/6/2003 the petitioner submitted the reply on 15/7/2003, which is filed as Annexure-P/8. It was specifically stated that he has not completed the age of 60 years. It was also contended that there are cases where the workmen have been in employment of SECL for about even more than 42 years and the Company has accepted this position in cases of Chandrika Prasad, Shot Firer and Jamuna Prasad, Foreman In-charge of Hasdeo area. The said representation was forwarded by the Deputy Chief Personnel Manager to the Chief General Manager on 18/08/2003. On 23/08/2003, a meeting had taken place between the office bearers and the representatives of the Management. Item no.7 related to consideration of the withdrawal of the notice of retirement in respect of Madhav

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Prasad, the petitioner, working in Vishrampur Area. This is contained in document Annexure-P/10. It is contended that thereafter, nothing was done and the representation was not decided.

5. Counsel for respondents 1 to 3 opposed and contended that the petitioner is a workman under the definition of the Industrial Disputes Act and the respondents no.1 to 3 fall within the definition of an industry under the said Act and as such any dispute pertaining to the service conditions between an employer and an employee is considered to be an industrial dispute. It is also contended that even otherwise disputed questions of facts and laws have been raised in the petition which could be adjudicated upon only after appreciation of evidence which could not be possible while hearing a petition under Article 226/227 of the Constitution of India. It is also contended that the petition has been filed belatedly. Counsel strenuously urged and referred to Section 40 of the Mines Act to the effect that no person shall be allowed to work in any part of a mine which is below ground unless he has completed his 16th years. It is contended that the matter is such which may be referred to the age determination committee.

6. Counsel for the petitioner on the other hand contended that the question involved in this petition is as to whether a person can be retired just on the memo Annexure-P/5 and the date of birth is not disputed.

7. Perusal of the record shows that this petition was filed on 23/06/2004. Notices were issued to the respondents on 7/7/2004. The respondents did not file the return. The matter was mentioned and it was only today on 24/12/2004 the return has been filed on behalf of respondents No. 1 to 3. The contention regarding delay in filing the petition is devoid of merit and liable to be dismissed. This contention

(6)

has no force. The delay has occurred on behalf of the respondents in not considering the representation dated 15/7/2003 and further not filing the return till 23/12/2004. So far as disputed questions are concerned, the date of birth of the petitioner as 1/7/1947 has not been disputed. It is borne out from the service record Annexure-P/1 and the pay slip of May, 2003 Annexure-P/3. So far as existence of an alternative remedy is concerned, it is not an absolute bar to the relief under Article 226 of the Constitution of India. It is a circumstance, which the Court has to take into consideration in exercising its discretionary power under Article 226. It does not take away the jurisdiction of the Court to grant relief under Article 226. The law is well settled. The Hon. Apex Court in the cases of ***Union of India vs. Verma T.R.*** reported in ***1958 SCR 499*** & ***Municipal Council vs. Kamal Kumar*** reported in ***AIR 1965 SC 1321*** has held so. The Hon. Apex Court also in the case of ***Harbanslal Sahnia and another vs. Indian Oil Corporation Limited and others*** reported in ***(2003) 2 SCC 107*** has held as under:

> *"The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged."*

8. The Hon. Apex Court also in the case of ***ABL International Limited and another vs. Export Credit Guarantee Corporation of India Limited and others*** reported in ***JT 2003 (10) SC 300*** (Para 27) has held that following legal principles emerge as to the maintainability of a writ petition:

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> *"a. In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.*
> *b. Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.*
> *c. A writ petition involving a consequential relief of monetary claim is also maintainable."*

9. A Division Bench of this Court in Writ Petition No.2072/2001 (K.P. Chandrawanshi and others vs. National Thermal Power Corporation Limited and others) while considering the law laid down by the Apex Court in the cases of ***ABL International Limited (supra)***, ***Harbanslal Sahnia (supra)*** & ***Radha Raman Samanta vs. Bank of India and others*** reported in ***(2004) 1 SCC 605***, has dealt with the matter. This Court further held that the writ petition is also maintainable where some disputed questions of facts arise for consideration and if it is otherwise justifiable on facts of the case in hand, a writ can be issued for any other purpose also. In view of the above legal position as emerges from the decisions of the Hon. Apex Court as well as this Court, the objections raised by the respondents about the maintainability of the writ petition are not sustainable and this petition is held to be maintainable.

10. So far as the memo dated 1/2/1999 Annexure-P/5 is concerned, on the basis of which the action has been taken, it reads as under:

> *" I am directed to state that it has come to the notice of Ministry that there are persons working in C.I.L. and its subsidiaries, who have rendered or are likely to render service of more than 45 years. Considering the retirement age of Coal Minor and the age of his entry in the service of P.S.Us., it is obvious that persons can not render service of over 42 years. If any coal minor is working beyond this time limit, it is likely that there is something wrong with the documents relating to his entry in the service of the Coal Company.*
> *It is therefore requested that the Company may look into this matter and consider taking disciplinary action under the Company Rules and penal action under the I.P.C. where*

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warranted, against such persons. A report in the matter may kindly be furnished to this Ministry within a fortnight. While taking action as suggested above, pending Court cases, if any, should be kept in consideration."

11. The petitioner entered into service on 19/12/1962. His date of birth is 1/7/1947. The petitioner has specifically stated that he was appointed as adolescent in surface of Kumda sub area as category-I labour and not below ground.

12. Section 40 does not contain bar for employment. It contains the pre-cautions, which are to be taken before allowing adolescent to work in any pat of a mine, which is below ground. This is protective and pre-cautionary section. An adolescent can be employed but cannot be posted in a mine unless the safeguards as contemplated are taken. The safeguards were provided for the purposes of posting in the below ground. Section 40(1) of the Mines Act contemplates that no adolescent shall be allowed to work in any part of a mine which is below ground unless conditions (a), (aa), (b) and (c) are completed. The petitioner here has specifically stated that he was posted in surface and this fact has not been denied. Even otherwise, the period of adolescent remained for three years only which expired in the year 1965. The petitioner attained the age of 18 years after 30/6/1965. He is also in employment till date. Under the circumstances, the provisions contained in Section 40 of the Mines Act do not help in any way the controversy raised in the case.

13. In view of the above discussions, it is amply clear that the age of retirement is 60 years. A person can be retired if he attains the age of 60 years. Annexure-P/5 does not authorise the department to serve a notice without properly looking into the matter. The impugned notice has been issued without any inquiry when the date of birth continues in the record. The department can certainly look into the matter and proceed in the matter in accordance with law after complying with the

requirement, but till that is done and the department after giving an opportunity comes to a finding that his date of birth is not the one which has been recorded, the action taken is not sustainable.

14. Counsel for the respondents submitted that they may be allowed to look into the matter as envisaged. No specific permission is required for the purpose. It is always open to the respondents to proceed and look into the matter in accordance with law.

15. Subject to the observations made above, the petition is allowed and the impugned notice dated 26/06/2003 directing for retirement is set aside.

Counsel fee as per scale.

Sd/-
Fakhruddin
Judge

24/12/2004

Hande/-